Supreme Court, U.S.
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No. 02-1430

IN THE

Supreme Court of the United States

NEDZAD KRZALIC and DANIJELA KRZALIC,

Petitioners,

v.

REPUBLIC TITLE COMPANY,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

BRIEF IN OPPOSITION

LELAND H. CHAIT
Counsel of Record
JONATHAN S. GOODMAN
LEO P. DOMBROWSKI
WILDMAN, HARROLD, ALLEN & DIXON
225 West Wacker Drive
Suite 3000
Chicago, IL 60606
(312) 201-2000

Counsel for Respondent

181014

COUNSEL PRESS
(800) 274-3321 • (800) 359-6859

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QUESTIONS PRESENTED FOR REVIEW

1. Whether the Seventh Circuit, like the Fourth and Eight Circuits (the only circuit courts of appeal to have considered this issue), properly ruled that the plain language of Section 2607(b) of the Real Estate Settlement and Procedures Act, 12 U.SC. § 2607(b) (Section 8(b)), shows that this statute is solely an anti-kickback provision and unambiguously requires that an alleged overcharge must be split or shared with a third party in order to violate Section 8(b)?

2. Whether in declining to defer to a policy statement issued by the Department of Housing and Urban Development (HUD) purporting to interpret Section 8(b) on the grounds of a lack of ambiguity in Section 8(b), the Seventh Circuit Court of Appeal's decision in this case was consistent with this Court's decisions in *Chevron, USA, Inc. v. Natural Resources Def. Council, Inc.*, 467 U.S. 837, 842 (1984) and its progeny?

3. Whether Petitioners' allegations of violation of Section 8(b) merit review by this Court when all circuit courts of appeal to have considered the issue have all held that Section 8(b) is unambiguous in requiring that an overcharge be split with a third party in order to violate the statute and that HUD's policy statement does not change that result; when this proper application of Section 8(b) furthers that statute's purpose of preventing kickbacks; and when claims like those the Petitioners assert in this case are of diminishing importance in light of HUD's proposed amendments to "Regulation X," 24 C.F.R. pt. 3500?

STATEMENT PURSUANT TO RULE 29. 6

The Respondent has no parent, and there are no publicly held companies that hold any stock of the Respondent.

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Respondent Republic Title Company respectfully requests that this Court deny the petition for writ of certiorari seeking review of the Seventh Circuit Court of Appeal's opinion in this case.

STATEMENT OF THE CASE

Petitioners Nedzad Krzalic and Danijela Krzalic (collectively, the Krzalics or Petitioners) are homebuyers and respondent Republic Title Company (Republic or Respondent) is an Illinois company that provides title insurance and settlement services for the sale and refinancing of real estate. In their putative class action complaint, the Krzalics alleged that Republic violated Section 8(b) of the Real Estate Settlement Procedures Act (RESPA), 12 U.S.C. § 2607(b), (Section 8(b)), and its implementing regulation, 24 C.F.R. pt. 3500 (Regulation X) in connection with their purchase of a condominium. The Krzalics alleged that Republic charged them more for recording a mortgage and release of mortgage with the Cook County Recorder of Deeds than the Recorder of Deeds charged Republic to record those documents. The Krzalics contend that the charges in excess of the Recorder of Deeds' charges were improper and violated Section 8(b) and Regulation X, the Illinois Consumer Fraud Act and the Illinois common law cause of action for money had and received. The federal claim under RESPA was the only basis for subject matter jurisdiction in the federal court.

A. Factual Background.

The Krzalics borrowed $154,574 from First Home Mortgage Corporation (First Home) to buy a condominium. To secure the Krzalics' obligation to repay the loan, which comprised in excess of 93% of the condominium's

$165,925.60 purchase price, First Home required that the Krzalics execute a mortgage providing First Home with a security interest in the condominium. Also as part of the transaction, once the seller's lender was repaid the outstanding amount of its mortgage loan to the seller, that lender discharged the rights conferred by its mortgage by issuing a release of that mortgage. In order to secure priority for First Home's security interest and to clear title to the property, the previous lender's release of mortgage and First Home's mortgage were recorded with the Cook County Recorder of Deeds. Thus, recording of the mortgage and the release of the seller's lender's mortgage were integral to the Krzalics' condominium purchase. Republic performed these recording services and charged the Krzalics for recording the mortgage and the sellers of the condominium for recording the release of mortgage.

At the closing of their purchase of the condominium, the Krzalics were provided with a Settlement Statement prepared on Form HUD-1 (the HUD-1). The Krzalics, advised by counsel at the closing, signed the HUD-1, acknowledging that they reviewed all costs and that they knew precisely how much they were being charged for all aspects of their real estate purchase, including Republic's recording charges. The HUD-1 indicates that Republic retained $49.50 in connection with recording First Home's mortgage. The Krzalics allege that the Cook County Recorder charged $35.50 to record the mortgage. The Krzalics claim that the $14 difference in the amount retained from settlement and the amount paid to the Recorder of Deeds to record the mortgage — .008% of the condominium's purchase price — was improper and that Republic kept these allegedly improper overcharges. The Krzalics do not allege that these purportedly improper charges were split with any other party.

In their Petition for Writ of Certiorari, the Krzalics also claim that Republic charged $25.50 to record the previous lender's mortgage release, and that the Recorder of Deeds only charged $23.50 to record the release. (Pet. at 2). As the Krzalics conceded before the district court and as the Seventh Circuit Court of Appeals noted in its opinion in this case, the sellers, not the Krzalics, were responsible for the mortgage release recording charges. The Krzalics correctly conceded that they did not have standing to sue as to this charge.

B. Proceedings Below.

1. District Court.

In a Memorandum Opinion and Order dated May 16, 2002, the district court granted Republic's motion to dismiss the Krzalic's complaint, holding that the Krzalics failed to state a claim for violation of Section 8(b). The Court declined to exercise supplemental jurisdiction over the Krzalics' state law causes of action, and dismissed the complaint in its entirety. *Krzalic v. Republic Title Co.*, No. 01 C 9979, 2002 U.S. Dist. LEXIS 8832 (N.D. Ill. May 16, 2002) (Pet. at App. B). The Krzalics appealed this decision to the United States Court of Appeals for the Seventh Circuit.

2. Appellate Court.

The Seventh Circuit affirmed the district court's dismissal of the Krzalics' complaint, rejecting the Krzalics' assertion that Section 8(b) prevents a settlement service provider from charging more for providing recording services than it is charged by the recorder of deeds. *Krzalic v. Republic Title Co.*, 314 F.3d 875 (7th Cir. 2002) (Pet. at App. A).

The Seventh Circuit concluded that the language of Section 8(b) unambiguously establishes that the statute is solely an anti-kickback provision and that an overcharge must be split or shared with a third party in order to violate this statute. Republic did not violate Section 8(b) because it did not "accept any portion, split or percentage of any charge," and "no one agreed to divide a receipt with Republic." *Krzalic*, 314 F.3d at 879 (Pet. at App. A at 7a).

The Krzalics argued to the Seventh Circuit, as they do here, that the appellate court was required to defer to a statement of policy issued by the Department of Housing and Urban Development (HUD) on October 18, 2001 (2001-1 Policy Statement). The 2001-1 Policy Statement addresses two separate issues: (i) yield spread premiums under RESPA, 12 U.S.C. §§ 2607(a) and (c) (RESPA Sections 8(a) and 8(c) respectively), and (ii) alleged overcharges for settlement services under Section 8(b). 66 Fed. Reg. 53,052 (2001). In the portion of the 2001-1 Policy Statement concerning Section 8(b), HUD suggests that it believes that Section 8(b) prohibits purported overcharges even when they are not split by at least two parties. *Id.* at 53057-59.

Guided by this Court's decision in *Chevron, U.S.A. Inc. v. Natural Resources Def. Council, Inc.*, 467 U.S. 837, 842 (1984) and its progeny, the Seventh Circuit rejected the Krzalics' request that the Court defer to the portion of the 2001-1 Policy Statement regarding Section 8(b). The Seventh Circuit recognized that interpretive materials like the 2001-1 Policy Statement are consulted to help determine the meaning of a statute only when the statute is ambiguous. *Krzalic*, 314 F.3d at 879 (Pet. at App. A at 7a). Because the Court found that Section 8(b) unambiguously does not apply to the conduct about which the Krzalics complain, such interpretive materials are irrelevant. *Id.*

In dicta, the Seventh Circuit also recognized that even if *Chevron* deference was an issue in this case, such deference is reserved for regulations and rules that are the product of significant study, public input and comment, and deliberation. *Id.* at 881 (Pet. at App. A at 11a-12a). While the portion of the 2001-1 Policy Statement addressing the propriety of yield spread premiums under RESPA Sections 8(a) and 8(c) was based upon extensive comment from, and debate with, a broad range of consumer and industry groups, the portion of the 2001-1 Policy Statement regarding Section 8(b) was issued without any similar comment, debate or deliberation. Accordingly, the Seventh Circuit determined that it would not owe deference to the Section 8(b) portion of the 2001-1 Policy Statement even if the statute was ambiguous. *Id.*

REASONS FOR DENYING THE PETITION

Since HUD's promulgation of the 2001-1 Policy Statement, the Fourth, Eighth and Seventh Circuit Courts of Appeal have decided whether alleged overcharges of settlement fees that were not split with a third party violate Section 8(b) of RESPA. *Boulware v. Crossland Mtg. Corp.*, 291 F.3d 261 (4th Cir. 2002); *Haug v. Bank of America, N.A.*, 317 F.3d 832 (8th Cir. 2003); *Krzalic*, 314 F.3d at 879 (Pet. at App. A at 7a). Each of these courts have said no after determining that Section 8(b) unambiguously applies only to claims that the settlement service provider gave or accepted a "portion, split, or percentage" of an overcharge (a charge "other than for services actually performed"). *See Boulware*, 291 F.3d at 265; *Haug*, 317 F.3d at 836; *Krzalic*, 314 F.3d at 879 (Pet. at App. A at 7a). All of these courts have held that the plain language of Section 8(b) unambiguously prohibits only splitting of overcharges between settlement

service providers. The circuit courts speak with one voice on the Section 8(b) question at issue in this case.

In their attempt to manufacture a split among the circuit courts where none exists, Petitioners fail to even mention either the *Boulware* or *Haug* cases. Instead, they contend that the appellate court's decision in *Krzalic* conflicts with the cases *Glover v. Standard Federal Bank*, 283 F.3d 953 (8th Cir. 2002), *Schuetz v. Banc One Mortgage Corp.*, 292 F.3d 1004 (9th Cir. 2002), and *Heimmermann v. First Union Mortgage Corp.*, 305 F.3d 1257 (11th Cir. 2002) which deferred to a different section of the 2001-1 Policy Statement and interpreted a different section of RESPA. (Pet. at 20-23). Those cases concern, unlike *Boulware* and *Haug*, a different business practice — yield spread premiums — and different statutes — Sections 8(a) and 8(c) of RESPA — than at issue in *Krzalic*. The cases cited in the Petition deferred to the 2001-1 Policy Statement's position on Sections 8(a) and 8(c) after finding that these statutes were ambiguous as to the issues presented in those actions. Unlike *Boulware* and *Haug*, these cases have nothing to say about Section 8(b), the statute at issue in this case.

Krzalic is, in fact, consistent with *Glover*, *Shuetz* and *Heimmermann* on the question of deference owed under *Chevron* and other relevant precedent of this Court. The ambiguity of Sections 8(a) and 8(c) drove *Glover*, *Schuetz* and *Heimmermann* to defer to the 2001-1 Policy Statement's positions on yield spread premium whereas the lack of ambiguity of Section 8(b) made the 2001-1 Policy Statement's views about Section 8(b) irrelevant to the dispute in this case.

There is nothing of significance for this Court to address. The unanimous agreement on the proper reading and application of Section 8(b) leaves nothing for this Court to decide. The plain language of Section 8(b) does not reach the conduct alleged in the Petitioners' complaint and this conclusion is supported by the statute's purpose and legislative history. Finally, HUD has proposed sweeping changes to Regulation X that, if implemented, would diminish the chances for future actions like the Krzalics have asserted here and the importance of any action by this Court on this case. The Seventh Circuit's ruling was proper in all respects and Republic respectfully requests that the Court deny the Petition for Writ of Certiorari.

I. Every Federal Circuit Court That Has Considered Whether Alleged Settlement Overcharges Violate Section 8(b) Has Determined That the Statute Is Unambiguous and Cannot be Violated Without Allegations of a Split of the Charge With a Third Party.

In arguing that there is a split of authority among the circuit courts of appeal, Petitioners ignore that the Fourth and Eighth Circuits have decided two cases (*Boulware* and *Haug*, respectively) that have virtually identical facts as *Krzalic*, and reached the same holding using the same rationale as *Krzalic*. These courts all dismissed Section 8(b) claims against settlement agents after finding that Section 8(b) was unambiguous in that it can be violated only if an alleged overcharge is split with a third party. All held that the pronouncement in the 2001-1 Policy Statement regarding Section 8(b) was irrelevant due to the lack of ambiguity of Section 8(b). *See Boulware*, 291 F.3d at 265; *Haug*, 317 F.3d at 836; *Krzalic*, 314 F.3d at 879 (Pet. at App. A at 7a).

Petitioners rely solely upon decisions construing a different statute and addressing a different business practice. *Glover*, 283 F.3d at 953; *Schuetz*, 292 F.3d at 1004; *Heimmermann*, 305 F.3d at 1257; (Pet. at 21-23). Properly viewed, there is no split among the circuit courts for this Court to resolve. Supreme Court Rule 10(a); *General Talking Pictures Corp. v. Western Elec. Co.*, 304 U.S. 175, 178-79 (1938) (recognizing that a writ of certiorari should not be granted where petition involves legal questions which have been uniformly resolved by the circuit courts of appeal.).

A. The Fourth Circuit's Decision in *Boulware* is Consistent With the Seventh Circuit's Decision That Section 8(b) Cannot be Violated Without a Split with a Third Party.

In *Boulware*, a plaintiff alleged that Crossland Mortgage Corporation overcharged her for credit reporting fees. *Boulware*, 291 F. 3d at 264. Because plaintiff did not allege that the purported overcharge was split with a third party, however, the court affirmed the dismissal of the case. In so doing, the Fourth Circuit held:

> The plain language of § 8(b) makes clear that it does not apply to every overcharge for a real estate settlement service and that § 8(b) is not a broad price-control provision. Therefore, § 8(b) only prohibits overcharges when a 'portion' or 'percentage' of the overcharge is kicked back to or 'split' with a third party. Compensating a third party for services actually performed, without giving the third party 'a portion, split, or percentage' of the overcharge does not violate § 8(b). By using the language 'portion, split, or

> percentage,' Congress was clearly aiming at a sharing arrangement rather than a unilateral overcharge.

Id. at 265.

The Fourth Circuit recognized that construing Section 8(b) not to require a split with a third-party would lead to the irrational result that the plaintiff herself would be exposed to potential liability, because she would be the "giver" of the funds who would also be liable for a Section 8(b) violation. *Id.* By enacting RESPA, Congress clearly did not intend to expose consumers to potential liability for paying unearned fees. *Id.* (noting, "[i]t would be perverse to find that Congress intended to impose [Section 8(b)] liability on consumers — the very group it was trying to protect in enacting RESPA."). Nor did Congress intend that Section 8(b) create price controls. *Id.* at 268 ("RESPA was meant to address certain practices, not enact broad price controls.").

Importantly, *Boulware* was decided after HUD's issuance of the 2001-1 Policy Statement upon which the Krzalics attempt to rely. The Fourth Circuit determined that it could not proceed past the statute's language to consider either HUD's interpretation of the provision as set forth in Regulation X or the 2001-1 Policy Statement because Section 8(b) is unambiguous. *Id.* at 267 ("Deference might well be due Regulation X or HUD's statement of policy if § 8(b) were ambiguous. . . . But the text of the statute controls in this case.") (internal citation omitted). Thus, *Boulware* is entirely consistent with the *Krzalic* decision.

B. The Eighth Circuit's Decision in *Haug* is Consistent With the Seventh Circuit's Decision That Section 8(b) Cannot be Violated Without a Split with a Third Party.

The Eighth Circuit Court of Appeal in *Haug* also determined that allegations of overcharges alone cannot state a claim under Section 8(b). *Haug*, 317 F.3d at 836. In reversing the district court's denial of Bank of America's motion to dismiss, the Eighth Circuit reaffirmed that Section 8(b) "is an anti-kickback provision that unambiguously requires at least two parties to share a settlement fee in order to violate the statute." *Id.* at 836. Because the plaintiff failed to plead facts showing that the defendant illegally shared its settlement service fees with a third party, she could not state a claim under the statute. *Id.*

The Eighth Circuit also held that the district court erred in relying upon the portion of the 2001-1 Policy Statement interpreting Section 8(b) to prohibit the paying or accepting of any unearned fee. *Id.* at 838. The appellate court found that the district court never determined that Congress' intent was unclear from Section 8(b)'s plain language, as is required to consider interpretive policy statements. *Id.* Like the Fourth and Seventh Circuits, the *Haug* court recognized that under *Chevron* the district court should have ended its analysis with the language of Section 8(b), and not consulted the 2001-1 Policy Statement's positions on Section 8(b), because the statute is clear on its face. *Id.* ("Because section 8(b) unambiguously requires the giving or receiving of an unearned portion of a settlement fee, the district court's inquiry should have ended with the plain language of the statute.").

C. The Krzalics' Attempt to Manufacture a Split in the Circuits Where None Exists.

The decisions Petitioners cite for the purported split among the circuits do not consider the language of Section 8(b), much less suggest that this statute is ambiguous. Nor do they concern alleged overcharges not split with a third party. (Pet. at 20-21); *Schuetz*, 292 F.3d at 1012-13, 1014 (recognizing that Sections "8(a) and 8(b) contain distinct prohibitions."); *Boulware*, 291 F.3d at 266 (sections 8(a) and 8(b) "both seek to eliminate kickbacks or referral fees paid to a third party, but they do so by prohibiting different conduct."); *see Heimmermann*, 305 F.3d at 1261; *Glover*, 283 F.3d at 961. These cases do not conflict with *Krzalic* or warrant this Court's attention.

The Eighth Circuit Court of Appeal's decision in *Haug* underscores this point. That court expressly recognized that its decision, the Seventh Circuit's decision in *Krzalic*, and the Fourth Circuit's decision in *Boulware*, were all *unrelated* to those cases (including the Eighth Circuit's own decision in *Glover*) determining that deference is required to the portion of the 2001-1 Policy Statement concerning yield spread premiums under Sections 8(a) and 8(c). *Haug*, 317 F.3d at 839. Indeed, *Haug* and *Glover* were not only both decided by the Eighth Circuit, but two of the three judges on the panel that decided *Haug* were also members of the panel that had earlier decided *Glover*. In declining to extend its decision in *Glover* to the Haugs' complaint, the *Haug* court noted that in *Glover*, "the court made a threshold determination that the precise issue before the court was not directly addressed by RESPA," and, as such, needed to consider interpretative data. *Id.* In contrast to the ambiguity

of Section 8(a) in *Glover*, the *Haug* court found that Section 8(b) was unambiguous and must be enforced as to its terms. *Id.*

In fact, the decision in *Krzalic* regarding the application of *Chevron* deference is entirely consistent with the decisions in *Heimmermann*, *Schuetz* and *Glover*. The Seventh Circuit (like the Fourth and Eighth circuits in *Boulware* and *Haug* respectively) did not defer to the 2001-1 Policy Statement concerning Section 8(b) because Section 8(b) is unambiguous. *Krzalic,* 314 F.3d at 879 (Pet. at App. A at 7a). The courts in *Heimmermann*, *Schuetz* and *Glover* deferred to the portion of the 2001-1 Policy Statement concerning Section 8(a) precisely because they found, like every other court that has reviewed these statutes, that Sections 8(a) and 8(c) are ambiguous. *Heimmermann*, 305 F.3d at 1261 (Section 8(a) "does not, by its plain language speak to the standard for determining whether the payment of a [yield spread premium] violates [RESPA]."); *Schuetz,* 292 F.3d at 1012 (making the preliminary determination that section 8(a) and 8(c) do not "unambiguously forbid[] [HUD's] interpretation.") (internal citation omitted); *Glover*, 283 F.3d at 961 (deferring to 2001-1 Policy Statement after determining that the legality of a yield spread premium payment "is not directly addressed by RESPA.").

Far from supporting a conflict as the Petition suggests, the Seventh Circuit's deference analysis is in harmony with this precedent. Because all of the appellate courts to have considered the question under nearly identical facts have found that Section 8(b) cannot be violated without an allegation of a split with a third party, there is neither a conflict among the circuits, nor an important legal question for this Court to resolve. *See Estelle v. Gamble*, 429 U.S. 97,

115 (1976) (Stevens, J., dissenting)(certiorari should not be granted where a case involves no more than the application of well-settled principles to a familiar situation and has little significance except for the parties involved.).

II. In Declining to Defer to the 2001-1 Policy Statement Because Section 8(b) Unambiguously Requires Sharing or Splitting of Overcharges with a Third Party, the Seventh Circuit's Decision Is Consistent With This Court's Precedent in *Chevron* and its Progeny.

The Krzalics argue that by declining to consider HUD's views regarding Section 8(b) espoused in the 2001-1 Policy Statement, the Seventh Circuit's decision necessarily conflicts with this Court's decision in *Chevron, USA, Inc. v. Natural Resources Def. Council, Inc.* 467 U.S. 837, 842 (1984) and its progeny. (Pet. at 18).

The Petition simply assumes, however, that Section 8(b) is ambiguous — such ambiguity being the threshold that must be crossed for courts to look to interpretive data like the policy statement. The bulk of the Petition is then devoted to cataloguing HUD pronouncements, including the 2001-1 Policy Statement, regarding HUD's interpretation of Section 8(b). (Pet. at 6-12, 18).[1]

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1. In the Petition, the Krzalics contend that in *Echevarria*, the Seventh Circuit implicitly acknowledged that Section 8(b) is ambiguous when it stated that absent a "formal commitment," it would not overrule 15 years of precedent regarding this statute. (Pet. at 18, *citing Echevarria v. Chicago Title & Trust Co.*, 256 F.3d 623, 630 (7th Cir. 2001)). There is simply no truth to the Krzalics' claim that *Echevarria* found ambiguity either in Section 8(b) or in (Cont'd)

There is no support for the Krzalics' assumption and, as discussed above, the decision of every circuit court decision concerning Section 8(b) compels the *opposite* conclusion. The plain language of Section 8(b), and its purpose and legislative history support the conclusion that this statute requires a split of an alleged overcharge to be actionable. Because statutory ambiguity is the gateway for consideration of regulatory data under *Chevron* deference analysis, the Seventh Circuit's refusal to consider the portion of the 2001-1 Policy Statement concerning the unambiguous Section 8(b) is consistent with this Court's precedent.

A. Section 8(b) Unambiguously Requires the Sharing or Splitting of Alleged Overcharges With a Third-Party.

Section 8(b) of RESPA, 12 U.S.C. § 2607(b), provides that:

> (b) Splitting charges
>
> No person shall give and no person shall accept any portion, split, or percentage of any charge made or received for the tendering of a real estate settlement service in connection with a transaction

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(Cont'd)

Regulation X. The *Echevarria* Court held that both Section 8(b) and Regulation X unambiguously required an alleged overcharge be split with a third party. *Echevarria,* 256 F.3d at 628. The Seventh Circuit's comment cited by Petitioners followed this finding about Regulation X. *Id.* at 630. The Seventh Circuit's comment simply suggests that the court might reassess its position should HUD formally amend Regulation X to expressly prohibit overcharges without requiring a third party split. No such amendment has occurred.

> involving a federally related mortgage loan other than for services actually performed.

12 U.S.C. § 2607(b).

The touchstone for determining the meaning of a federal statute is the statute itself. "The plainness or ambiguity of statutory language is determined by reference to the language itself, the specific context in which that language is used, and the broader context of the statute as a whole." *Robinson v. Shell Oil Co.*, 519 U.S. 337, 341 (1997). *Chevron* commands that where a federal statute is unambiguous, courts need not consider, much less defer to, regulatory material interpreting that statute. ("If the intent of Congress is clear, that is the end of the matter; for the court, as well as the [administrative] agency, must give effect to the unambiguously expressed intent of Congress."). *Chevron, U.S.A., Inc.*, 467 U.S. at 842-43. Even where, as with HUD and RESPA, an administrative agency is delegated specific interpretive authority, there must be some statutory ambiguity to be resolved before courts are to turn to that agency's interpretation of the federal statute. *Id.*; *see also United States v. Mead Corp.*, 533 U.S. 218, 229 (2001) (recognizing that statutory ambiguity is required before considering deference to executive interpretation.). This Court instructed in *Chevron* that "[t]he judiciary is the final authority on issues of statutory construction and must reject administrative constructions which are contrary to clear congressional intent." *Chevron, U.S.A., Inc.*, 467 U.S. at 843, n.9.

As every federal circuit court addressing the question has found (including *Boulware*, *Haug* and *Krzalic*), the plain language of Section 8(b) prohibits not all allegedly improper charges by a settlement provider, but only those where the

purportedly improper charge is "split" with a third party. *Boulware*, 291 F.3d at 265; *Haug*, 317 F.3d at 838; *see also Krzalic*, 314 F.3d at 879 ("Republic Title did not 'accept any portion, split, or percentage of any charge.'") (internal citation omitted) (Pet. at App. A at 7a); *Echevarria*, 256 F.3d at 627 (affirming dismissal of complaint for failing to allege overcharge split with third party "makes sense considering [] RESPA's plain language."); *Durr v. Intercounty Title Co. of Ill.*, 14 F.3d 1183, 1187 (7th Cir. 1994) (affirming dismissal of plaintiffs' complaint because "under RESPA's express terms, this broad protection [against increased costs of real estate transactions] extends only over transactions where the defendant gave or received 'any portion, split, or percentage of any charge' to a third party.") (quoting *Mercado*, 763 F.2d at 270); *Mercado v. Calumet Fed. Sav. & Loan Assoc.*, 763 F.2d 269, 271 (7th Cir. 1985) ("The language and structure of the statute establish how far to go . . . section 8(b) contains an intelligible stopping point, to which we adhere.").

As the Seventh Circuit recognized, the Krzalics' assertion that they can state a Section 8(b) claim by alleging that Republic kept the full amount of a purported overcharge, reads out of the statute the "portion, split, or percentage" requirement. *Krzalic*, 314 F.3d at 879 (Pet. at App. A at 7a). Selectively excising language enacted by Congress is not interpretation. *See TRW Inc. v. Andrews*, 534 U.S. 19, 31 (2001) ("It is a cardinal principle of statutory construction that [] no clause, sentence, or word shall be superfluous, void, or insignificant.") (internal citation omitted). To the contrary, "statutes must be interpreted, if possible, to give each word some operative effect." *Walters v. Metropolitan Educ. Enters., Inc.*, 519 U.S. 202, 209 (1997).

In essence, acting under the guise of *Chevron* deference analysis, the Krzalics are asking this Court to review the Seventh Circuit's decision based almost exclusively on interpretive data that this Court's precedent dictates should not be considered. Because the statute's plain language controls, this Court should not indulge the Krzalics' request.

B. The Seventh Circuit's Decision Comports With Section 8(b)'s Purpose and Legislative History.

Because the language of Section 8(b) plainly requires that an alleged overcharge must be split with a third party, there is no need for the Court to consider interpretive material. *Robinson*, 519 U.S. at 340. To the extent that Section 8(b) needs explication, however, the surrounding parts of the statute and its legislative history are the first sources to consult. *Blum v. Stenson*, 465 U.S. 886, 896 (1984) (if "a question of federal law turns on a statute and the intention of Congress, we look first to the statutory language and then to the legislative history if the statute is unclear."). The Seventh Circuit's holding is in line with Section 8(b)'s purpose, as articulated in the statute itself, and the statute's legislative history.

Congress included as the first section in RESPA an expression of the statute's purposes. *See* 12 U.S.C. § 2601(b). The purpose germane to Section 8 shows that the prohibitions in that section were aimed at kickback and fee-splitting arrangements, not every complaint arising from the settlement of real estate transactions. 12 U.S.C. § 2601(b) provides that RESPA's purpose is:

> (b) to effect certain changes in the settlement process for residential real estate that will result —

* * * *

> (2) in the *elimination of kickbacks or referral fees* that tend to increase unnecessarily the costs of certain settlement services.

12 U.S.C. § 2601(b)(2) (emphasis added).[2] Significantly, there is no mention in this provision concerning fees of an intent that RESPA address all allegedly improper fees or any conduct that may increase the costs of settlement services.

The legislative history of Section 8(b) also shows that this statute was intended to cover the split or kickback of settlement services, not a plaintiff's belief that he or she may have been charged too much for a particular service. *Haug*, 317 F.3d at 837 (noting that "Congress considered and rejected proposed legislation that would have set a system of price controls for settlement service fees."). The *Haug* court succinctly described Section 8(b)'s legislative history on the requirement of a fee split with a third party:

> In 1973, two settlement cost bills were introduced to Congress and referred to the Committee on Banking, Housing, and Urban Affairs. Senator Brock introduced S. 2228, and Senator Proxmire introduced S. 2288. Although the bills were similar in many respects, they differed with regard

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2. Congress articulated in this statute three additional purposes to RESPA not relevant to this case: more effective advance disclosure to home buyers and sellers of settlement costs; reducing the amounts home buyers are required too place in escrow accounts for payment of real estate taxes and insurance, and "significant reform" in local recordkeeping of land title information. 12 U.S.C. § 2601(b)(1), (3)-(4).

> to the authority bestowed on HUD and the Veterans Administration ('VA') to regulate settlement services charges. The Proxmire bill would have required HUD to establish maximum amounts for settlement charges on virtually all mortgage transactions within 180 days of enactment. The Brock bill, which the Committee ultimately adopted, repealed section 701 of the Emergency Home Finance Act of 1970, which bestowed authority on HUD and the VA to regulate standards for settlement costs. Rather than directly regulating closing costs by limiting real estate settlement charges, Congress instead chose to 'regulate the underlying business relationships and procedures of which the costs are a function.' U.S.C.C.A.N. 6548. In so doing, Congress specifically designed [s]ection 8(b) to eliminate kickbacks and fee splits by 'prohibit[ing] a person or company that renders a settlement service from giving or rebating any portion of the charge to any other person except in return for services actually performed.'

Id. at 837-38 (quoting U.S.C.C.A.N. 6551).[3]

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3. This conclusion is supported by congressional debate on H.R. 9989 (section 106(b) of which would be included in what is now Section 8(b) of RESPA). During this debate Rep. Blackburn repeated the viewpoint of the Committee reports for both the Senate and House bil s, that the prohibition section of section 106

> does not in any way authorize a civil suit nor subject an attorney or anyone else who provides settlement services

(Cont'd)

The statutory language and its legislative history supports the Seventh Circuit's conclusion that Congress did not intend to federalize all potential overcharges in a settlement context.[4] This Court should not expend its limited resources addressing a decision that is consistent with that of all other circuit courts, this Court's precedent, and the statute's language, stated purpose, and legislative history. *Estelle*, 429 U.S. at 115 (Stevens, J., dissenting).

C. Deference Is Not Owed to the Portion of the 2001-1 Policy Statement Concerning Section 8(b).

Even if Section 8(b) was ambiguous (which it is not), the Krzalics' reliance on the 2001-1 Policy Statement does not help to sustain their Section 8(b) claim. First, under *Chevron*, if Section 8(b) was ambiguous even after analysis of the statute and its legislative history, the next source to

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(Cont'd)

> to civil or criminal penalties if the homebuyer believes that the charge made to him is in excess of the reasonable value of the services rendered. What is subject to civil and criminal penalties is if the person rendering the settlement services gives or splits a portion of the fees he receives with someone else and the person receiving the payment provides no legitimate services in return.

120 Cong. Rec. 29,442-43 (Aug. 20, 1974).

4. Further, the penalty provision applicable to Section 8(b) confirms that Section 8(b) is a fee-splitting provision. Section 8(d)(2) of RESPA requires that violators of Section 8 "shall be *jointly and severally liable* to the person or persons charged for the settlement service involved in the violation" in an amount equal to three times the charge paid. 12 U.S.C. § 2607(d)(2) (emphasis added).

consider in resolving the ambiguity would be the agency's promulgated regulation — in this case, Regulation X. *Chevron, U.S.A., Inc.*, 467 U.S. at 843-44. Regulation X is itself virtually identical to Section 8(b) and is unambiguous in that it applies only to alleged overcharges split with a third party. *See Echevarria*, 256 F.3d at 628; *Willis v. Quality Home Mortgage U.S.A., Inc.*, 5 F. Supp.2d 1306, 1309 (M.D. Ala. 1998).

Nor would the portion of the 2001-1 Policy Statement concerning Section 8(b) be entitled to deference on its face. It has not been the subject of any formal debate, review, notice, comment or any other ventilation whatsoever. It is not the product of a mandate from Congress commanding an answer to a specific question, as was the portion of this Policy Statement that addressed yield spread premium and Section 8(a).

As noted above, the cases the Krzalics cite in the Petition where deference was given to the 2001-1 Policy Statement, all involved yield spread premiums and the portion of the Policy Statement construing ambiguous Sections 8(a) and 8(c). *See Heimmermann*, 305 F.3d at 1261; *Glover*, 283 F.3d at 961; *Schuetz*, 292 F.3d at 1012. HUD's yield spread premium findings were the product of intense study by HUD for seven years, including copious solicitation of consumer and industry views, and numerous rulemaking efforts during that time. *See* 64 Fed. Reg. 10,080. In contrast with this care and deliberation on this issue, there is no evidence of solicitation of the views of interested parties, debate or reasoned deliberation on the portion of the 2001-1 Policy Statement that addresses HUD's construction of Section 8(b). Despite HUD's obvious ability and willingness to seek detailed information and process competing views and its

experience in generating well-ventilated policy statements, HUD did not do so as to its statements concerning Section 8(b). It simply published its views in the Federal Register, and they can be changed or rescinded as easily as they were promulgated. *See* 24 C.F.R. § 3500.4; *Krzalic*, 314 F.3d at 881 (*Easterbrook* concurring) (Pet. at App. A at 11a).

The portion of the 2001-1 Policy Statement addressing Section 8(b) was subject to none of the testing, consideration and deliberation that is the hallmark of agency promulgations entitled to *Chevron* deference. Moreover, that portion of the Policy Statement is contrary to the statute's language, purpose and legislative history. Consequently, the Seventh Circuit properly concluded there was no basis for deference to the 2001-1 Policy Statement. *See Barnhart v. Walton*, 122 S. Ct. 1265, 1271-72 (2002) (recognizing that for an agency pronouncement to be entitled deference, the pronouncement must be the result of careful consideration and deliberation.).

III. No Issues Merit Review in This Case.

It is a bedrock principle of this Court's jurisprudence that a conflict among the circuits on an issue important to the public aside from the parties to the case is a primary ground for granting certiorari:

> If it be suggested that as much effort and time as we have given to the consideration of the alleged conflict would have enabled us to dispose of the case before us on the merits, the answer is that it is very important that we be consistent in *not granting the writ of certiorari except* in cases involving principles the settlement of which is of importance to the public, as distinguished from

> that of the parties, and in cases where there is a real and embarrassing conflict of opinion and authority between the Circuit Courts of Appeal.

Layne & Bowler Corp. v. Western Well Works, Inc., 261 U.S. 387, 393 (1923) (emphasis added). As demonstrated earlier in this memorandum, there is no circuit split. Neither have petitioners raised any contentions that have significance beyond this action.

A. There Is No Legal Question for this Court to Resolve.

First, the Krzalics incorrectly suggest that this case presents an unresolved legal question. (Pet. at 5). As shown earlier in this brief, every circuit court faced with the claim that overcharges for recording fees violates Section 8(b) agrees that a purported violation of that statute unambiguously requires a fee split with a third party. *See Krzalic,* 314 F.3d at 879 (Pet. at App. A at 7a); *Boulware*, 291 F.3d at 265; *Haug*, 317 F.3d at 838. Thus, the Krzalics are asking this Court to address a settled issue.

B. Proper Application of Section 8(b) does not Eviscerate RESPA.

The Krzalics also mistakenly contend that the Seventh Circuit's holding would eviscerate RESPA by allowing settlement service providers to "upcharge" for their services, and purportedly make it "impossible" for the borrower to determine the real price of Republic's services. (Pet. at 12-13). This theory does not relate to Section 8(b), the statute Republic is alleged to have violated, which, as evidenced by its language, purpose and legislative history,

concerns kickbacks to third parties, not disclosure. Moreover, Petitioners' theory is based upon the demonstrably false premise that they were not aware of the settlement charges about which they complain. Far from not knowing the charges, the HUD-1 form for their transaction disclosed the exact transaction charges for which the Krzalics would be responsible, the Krzalics were advised by counsel at the time they reviewed this HUD-1 form, the Krzalics agreed to pay these charges, and the Krzalics do not allege that they were charged one penny more than they agreed to pay. In short, the Krzalics, and their counsel, had all the information needed to evaluate the charges.

As the Seventh Circuit noted, RESPA is not a price control statute and does not cap the amount that settlement service providers can charge. *Krzalic,* 314 F.3d at 880 (Pet. at App. A at 8a-9a). For this reason, the upshot of Petitioner's claim is that Republic had to put the difference between the recorder's fee and the recording charge at closing on a separate line on the HUD-1 form. The Seventh Circuit rejected this contention as immaterial:

> At the closing on the Krzalics' real estate transaction, Republic charged them a closing fee of $315 plus various expenses that included the $50 recording fee. Had Republic charged the Krzalics only the actual recording fee of $36, it could have raised its closing fee to $329 and be in the identical economic position that it was in with the repricing of the fee. The [Krzalics] and HUD argue that Republic would have been reluctant to do this because then the [Krzalics] might have taken their business to a closing agent that charged a lower closing fee. But all that

> borrowers care about is the bottom line — which in this case was approximately $165,000 — and that would not have been affected by which line contained the $14; the sum of $315 and $50 is identical to the sum of $329 and $36.

Krzalic, 314 F.3d at 880 (Pet. at App. A at 9a). Upon which line of the HUD-1 form the charge appears, particularly in the context of an entire six-figure transaction, certainly cannot be construed to have a "profound effect" on any party involved in the transaction. *Id.*

Finally, as the *Boulware* court noted, recognizing that Section 8(b) requires that an alleged overcharge be split with a third party does not gut this statute. It simply recognizes that the statute does not make federal cases out of every allegation of wrongful conduct arising from real estate transactions. This reading of Section 8(b) "makes sense of all of the statute's terms and leaves a wide variety of conduct prohibited," including, without limitation, circumstances in which "a mortgage lender overcharges a consumer and splits the overcharge with a mortgage service provider," or where a mortgage service provider overcharged for its services and gave a mortgage lender a portion of the unearned fee. *Boulware*, 291 F.3d at 266. Under the circuit courts' uniform understanding and application of Section 8(b), the statute prohibits a broad range of conduct — just not the conduct claimed by the Krzalics.

C. The Current Interpretation of Section 8(b) is of Diminishing Importance in Light of HUD's Proposed Revisions to Regulation X.

The current interpretation and application of Section 8(b) is of diminishing importance because HUD is in the process of formal notice-and-comment rulemaking which, if

implemented, would radically revamp Regulation X. *See* 67 F.R. 49134, Proposed Rules, Department of Housing and Urban Development, 24 C.F.R. Part 3500 (July 29, 2002). HUD's substantial proposed changes to Regulation X would dramatically recast the manner in which all settlement charges will be presented by revising the disclosures to be made on the HUD-1 settlement forms, and permitting settlement service providers to package their services in one up-front fee, in which case no separate presentation of closing costs will be made to the borrower. *Id.*

These significant revisions to Regulation X will likely affect the very issues raised in this case, including the potential to obviate them altogether. Any guidance provided by the Court if it were to grant certiorari would likely be short-lived, at best, under these circumstances.

CONCLUSION

For these reasons, the Petition for a Writ of Certiorari should be denied.

Respectfully submitted,

LELAND H. CHAIT
Counsel of Record
JONATHAN S. GOODMAN
LEO P. DOMBROWSKI
WILDMAN, HARROLD, ALLEN & DIXON
225 West Wacker Drive
Suite 3000
Chicago, IL 60606
(312) 201-2000

Counsel for Respondent